NO. 80-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER,
DIRECTOR OF SELECTIVE SERVICE,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE ORTHODOX JEWISH COALITION ON THE DRAFT, *AMICUS CURIAE*

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BRIEF FOR THE ORTHODOX JEWISH COALITION ON THE DRAFT

This brief is being filed with the consent of the parties.

The Orthodox Jewish Coalition on the Draft is an *ad hoc* umbrella group of the major Orthodox Jewish organizations in this country and includes: Agudath Israel of America, Central Rabbinical Congress, Mosdos Bobov, National Council of Young Israel, National Society for Hebrew Day Schools (Torah Umesorah), National Jewish Commission on Law and Public Affairs (COLPA), Poalei Agudath Israel, Rabbinical Alliance of America, Rabbinical Council of America, Religious Zionists of America, Union of Orthodox Jewish Congregations of

America (UOJCA), Union of Orthodox Rabbis of the United States and Canada, United Lubavitch Organization, and the United Satmar Community.

INTEREST OF THE AMICUS

The Orthodox Jewish Coalition on the Draft ("Coalition") represents the entire spectrum of Orthodox Judaism in America. The Coalition is comprised of organizations representing over a million people who share the most profound appreciation of our Nation's democratic principles—particularly the traditions of religious freedom and mutual tolerance—which have enabled them to thrive culturally and spiritually. The Coalition was formed to voice the strong opposition of the Orthodox Jewish Community to the inclusion of women in the Selective Service System.

As Americans, Orthodox Jews share the concern of their fellow citizens for the maintenance of the fabric of American society. As members of a minority faith which has historically been victimized by international conflicts, they are peculiarly sensitive to issues affecting the military security of the Nation which has given them shelter and granted them equality under the law.

The Coalition believes the conscription of women would rend our society as perhaps no other issue could. On an individual level, it would promote rootlessness and the dissolution of the family unit which has long served as a stabilizing element in society. Socially, it would create conflict and disharmony between the majority of our society and substantial minority groups who could not conscientiously cooperate with it. Thus, the Coalition believes that the conscription of women would cause untold damage to the American way of life and the particular way of life of Orthodox Jewish religionists. It would undermine national unity, subvert our national resolve,

and introduce irrelevant and divisive elements into our defense efforts. This Nation's ability to defend itself in time of emergency would thereby be compromised.

As the representative of Orthodox Jews, the Coalition has an even more directly compelling reason to oppose the registration and drafting of women. The highest Orthodox Rabbinic authorities have ruled that *as a basic tenet of Jewish Law,* relating to its code of modesty and chastity, Jewish women are enjoined from cooperating with or submitting to conscription. Thus, if the district court is upheld, Orthodox Jewish women would be placed in an impossible dilemma—the choice between obedience to the law of the land and violation of a binding tenet of their faith. (See testimony of Rabbi Herman Neuberger, Hearings of the House Subcommittee on Military Personnel, March 5, 1980.

The Coalition is mindful of the fact that in the State of Israel, where women are subject to the draft, the law effectively provides an exemption for women on religious grounds. However, it is not certain that Congress would enact a similar exemption, nor that such an exemption would withstand constitutional scrutiny.

The Coalition is also aware that since Jewish law would prohibit Jewish women, on religious grounds, from any participation whatever with the selective service, they may arguably be covered by §6(j) of the Universal Military Training and Service Act—providing for exemption to those who "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." However, by its terms that exemption relates only to "combat training and service in the Armed Forces of the United States" and would leave open conscription for alternative service which, as noted, is equally forbidden by Jewish Law.

Hence the issue of the continuance of the male-only draft is of vital concern to the Coalition.

QUESTIONS PRESENTED

I

WHETHER THE DISTRICT COURT ERRED IN APPLYING STANDARDS DEVELOPED IN SEX-DISCRIMINATION CASES IN CONSIDERING THE VALIDITY OF THE EXCLUSION OF WOMEN FROM CONSCRIPTION UNDER THE MILITARY SELECTIVE SERVICE ACT ("THE ACT").

II

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE ACT'S INVALIDITY UPON A FINDING THAT THE EXCLUSION OF WOMEN FROM CONSCRIPTION WAS NOT "SUBSTANTIALLY RELATED" TO THE "IMPORTANT GOVERNMENT OBJECTIVE" OF ENHANCING MILITARY FLEXIBILITY, WHILE FAILING TO CONSIDER THE ACT'S IMPACT ON OTHER SUBSTANTIAL GOVERNMENT INTERESTS.

PRELIMINARY STATEMENT

This case involves a determination by a district court that the Military Selective Service Act unconstitutionally discriminates between males and females because the gender-based distinction in the statute was not "substantially related to important governmental objectives." The court based its ruling on its findings that women were successfully being used by the military as volunteers and "[military] flexibility is not enhanced, but is in fact limited by the complete exclusion of women." (Jur. St., 43a)

We submit that the district court erred in viewing the

issue as one of invidious gender based discrimination thereby raising equal protection questions. Furthermore, assuming that the court properly identified the issue, in determining that the Act is not "substantially related" to "important government objectives," it nonetheless erred in failing to consider all of the public interests which Congress evaluated.

ARGUMENT

POINT I

BECAUSE FEMALE CONSCRIPTION RAISES ISSUES DISTINCT FROM MILITARY SERVICE, EXCLUSION OF WOMEN FROM THE DRAFT FOR SUBSTANTIAL REASONS OF PUBLIC INTEREST IS NOT A "BADGE OF INFERIORITY" AND DOES NOT STIGMATIZE WOMEN.

The parties in this litigation have presented the issue, and the court below has viewed it, as a question of gender based discrimination. Their dispute has turned on a difference over the proper standard to be applied in analyzing the Act's constitutionality. The government argues that a Congressional determination involving national defense shall be reviewable under the "rational relationship" test as applied in *Schlesinger v. Ballard,* 419 U.S. 498 (1975). Appellee contends, and the court below held, that the "important government interest" test applies. (See *Craig v. Boren,* 429 U.S. 190 (1976).) The district court also noted that "[g]ender discrimination is a badge of inferiority and must pass constitutional review whether or not it is for the benefit of women . . . . Equal protection involves protection from seemingly well-intentioned classifications that in fact relegate women to an inferior status." (Jur. St. 15a, footnote and citations deleted).

This limitation of the controversy, and the district court's reasoning is flawed. Gender based discrimination is not the principal issue at bar because the Act was neither designed to benefit or to disadvantage women, nor is there any evidence that it is so perceived. Rather, it balances the national need for an available pool of potential military manpower, for times of emergency, against the social disruption and unknown risks that conscription of women would entail. Congress expressly recognized that

> [t]he question of who should be required to fight for the nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society. In addition to the military reasons, which the Committee finds compeling witnesses . . . testified before the Subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in a time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result.

Report of the Senate Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, 5 (April 22, 1980) (R 878).

Thus, the attention of Congress was clearly on the social impact, and potential danger to military preparedness which would result from a novel experiment in female conscription. The potential danger was identified as feared unrest caused by widespread social or conscientious opposition to, and non-cooperation with, female conscription. It was not based on an invidious judgment of women's capacity to serve, usefully and honorably, in the armed forces. Consequently, the exclusion of women from *conscription* is an issue which involves separate and distinct interests and considerations from the issue of *service* of women in the armed forces. There is in the Act. no

implication whatever, that women could not honorably serve in the armed forces (in fact they do so and Congress encourages such participation), and no question of invidious discrimination or "badge of inferiority" is presented.

Congress can certainly employ gender-based discrimination in framing public policy where the distinctions are reflective of a reality that men and women are not similarly situated—even when that reality is the result of other legislative or policy judgments. *Schlesinger v. Ballard*, id., at 508.

POINT II

THE DISTRICT COURT ERRED IN FAILING TO PLACE IN THE BALANCE THE CONFLICTING SOCIAL INTERESTS WHICH, IN ADDITION TO THE MILITARY QUESTION, FORMED THE BASIS FOR CONGRESS' DETERMINATION TO EXCLUDE WOMEN FROM THE DRAFT.

It cannot be gainsaid that the question of the participation of women in the Selective Service System has been one of the most publicly debated issues in recent years. While this certainly does not preclude judicial involvement, the essence of the debate indicates that what is involved here is a deep-rooted social value related to the kind of society that Americans wish to have. Plaintiffs and the court below have throughout this litigation characterized the underlying issue as being whether women are entitled to equal opportunity. This is not the case. What is at issue here is whether or not the American society wishes to have it that women will be *compelled* to serve in the military. The differing treatment of the sexes in the connection with military conscription is simply a recognition of differing roles that women actually play in

society. A substantial portion of our society, probably a majority, as a whole, both men and women, simply do not look to women to defend the country. Conversely, nowhere is it claimed that individual women should be denied voluntary participation in the military or that women in most non-combat positions cannot perform adequately.

Moreover, in its report (*see supra,* p. 6), the Senate Subcommittee concluded that, "there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be *required* to fight for the nation . . . is a social issue of the highest order, with sweeping implications for our society." The report also cited the testimony of "witnesses representing a variety of groups . . . that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency." The subcommittee further recognized that substantial and unpredictable risks to military preparedness may be raised by female conscription. Congress, therefore had evidence of the impact on basic institutions of society that registration of women would have. Whether plaintiffs, the lower court, or indeed this court differs with Congress's assessment, it is Congress's assessment to make under our system.

Throughout this litigation there has been much discussion as to the appropriate judicial standard to apply to the Congressional determination to limit conscription to men.

This court has had a number of occasions over the past decade to issue guidelines on the meaning of the equal proaching certainty." id. What is certain, however, is that classification. However, as noted by Mr. Justice Brennan "the standard of review to be applied . . . has been a subject of considerable debate, compare *Schlesinger v.*

Ballard, 419 U.S. 498 (1975), with *Craig v. Boren,* 429 U.S. 190 (1976)." (Jur. St., 50a). Moreover, the application of the appropriate standard in a case involving the selective service "cannot be predicted with anything approaching certainty." What is certain, however, is that whichever standard is applied all of the governmental interests which are affected by the legislation under review, and which were considered by Congress, must be placed in the balance by the reviewing court. Congress' concerns at bar included its recognition that female conscription would, in one fell swoop, utterly transform American Society and would create risks for mobilization of our armed forces in times of crisis. Congress was not solely concerned with the problem of integrating women within the military but, with its effect on the mobilization process and the national resolve of our citizenry in a time of extreme crisis. Indeed Senator Heflin expressed the view that "the opposition to registering women is so widespread and pervasive that if women were required to register it might jeopardize the whole registration program." 126 Cong. Rec., S. 1242 (February 7, 1980). The district court's application of the "substantial relationship" test (See *Craig v. Boren*) was thus improperly done. Its analysis of the applicability of the test centered exclusively on the ability of the Armed Forces to operate with sufficient "flexibility." What was totally ignored was Congress's stated concern about the impact on mobilization of the inclusion of women in the draft and our national resolve. That it would create unacceptable risks at a time of emergency is certainly a judgment that Congress should make irrespective of which "test" is applied.

CONCLUSION

The determination of the district court, having been based on a selective view of the record, and having failed to consider substantial governmental interests which underlay Congress' action, is fatally flawed and should be reversed.

Respectfully submitted,

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